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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 128

WALTER F. TELLIER, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY MEMORANDUM

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The Government's labored efforts to sustain the ruling below are so full of what Mr. Jefferson, in classic phrase, called "twistifications"[1] that this reply memorandum becomes not only appropriate but unavoidable.

First. The Government (Br. Op. 2) erroneously postulates the first question herein to be this: "Whether

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[1] Jefferson to Madison, May 25, 1810, quoted in 4 Beveridge, *The Life of John Marshall*, 105.

a conversation between attorney and client is privileged when the parties intend to convey the information to others." That Governmental language manifestly does not correctly or truly present the first question; instead, it only begs that question.

The true initial question presented herein is whether, when a written communication that is prepared for transmission to outsiders is sent partly in consequence of a privileged oral conversation between attorney and client, the dispatch of the written communication *ipso facto* destroys the privilege attaching to the oral conversation, which in every significant respect is watered down in, and different from, the subsequent writing. Otherwise stated, does a subsequent written communication that is sent to others after a privileged attorney-client conference rob the precise words of the antecedent oral conference of the privilege? The majority below declared that it did, Judge Lumbard held it did not.

The majority said (Pet. A12), "the privilege attaches to the substance of a communication and not to the particular words used to express the communication's content." Judge Lumbard, dissenting, expressed precisely the contrary view (Pet. A23): "The privilege of the attorney-client relationship attaches to the particular words used or it is no privilege at all."

At the present juncture it would manifestly be inappropriate to argue at length the merits of those conflicting views. It now is sufficient merely to note that, *non constat* the Government's hopeful but unwarranted assertion (Br. Op. 8) that "The case basically turns on its particular facts," the question as reflected in the excerpts just quoted from the two opinions is plainly one of law, and an extremely important question of law at that.

If the majority's opinion stands, then no conference between attorney and client is ever protected by the seal of confidence if, in partial consequence of that conference, any communication of any kind—however different in content, purpose, and effect—is made for disclosure to others, be it a letter, a pleading, or even a brief. It was because of this inescapable and inevitable consequence of the majority opinion below that Judge Lumbard in dissent said, *inter alia,* (Pet. A20), "Thus it seems to me that the reasoning of the majority sucks all the vitality and usefulness from the attorney-client privilege; it whittles the privilege to nothing and, worse still, it makes the attorney a witness against his client."

And it is because of the corrosive and destructive impact of the ruling below on the aggregate of all attorney-client relationships everywhere and at all times that it should be reviewed here.

We have already pointed out (Pet. 22) that there was no waiver of attorney-client privilege involved here in anything done or omitted to be done by petitioner at the trial. But we think it well to add, because of the Government's attempt to resurrect the theory of such waiver on which the district judge relied (Br. Op. 14-15), that the latter's view failed to commend itself to any member of the Court of Appeals during the nearly five months that this case was under consideration there. In the present posture of the case, extended argument being necessarily precluded, we content ourselves with supplying some additional references in the margin in support of petitioner's position.[2]

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[2] The only "new" point made by the Government that is not already fully answered and anticipated by the matter in Pet. 22-23, note 3, is the contention (Br. Op. 14-15) that the opening

Second. The heart of petitioner's final point is that although 28 U.S.C. § 1732(a) authorizes the admissibility of business records only "if made in regular course of any business," the court below nevertheless upheld the admission of the ones here in question in the face of its own specific finding (Pet. A13) "that there was indeed insufficient competent evidence to establish that the books and records were kept in the ordinary course of business." Thus the ruling below cuts out of the statute the very safeguards on which Congress expressly conditioned the admissibility of hearsay entries contained in books and records.

We confess ourselves utterly unable to understand the Government's novel and anomalous contention (Br. Op. 17) that the books were admissible "without regard to the truth of their contents," particularly since the Government itself is using them here as allegedly truthful.[3] Plainly, those books and records had no

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to the jury of petitioner's trial counsel (Tr. 40-44) disproves petitioner's position that each series of debentures was a separate transaction. Passing the obvious point that an opening statement to a jury has no evidentiary or probative value (e.g., *United States* v. *Tomaiolo*, 249 F. 2d 683 689 (C. A. 2)), the fact is that petitioner's position is fully supported by, e.g., the testimony of the Government's own principal witness Cahn (12a-13a):

> "The Court: Was that while you were acting as attorney in connection with this Alaska Telephone matter or was it later?
> "The Witness: It was while I was acting as counsel for Mr. Tellier in connection with the Alaska Telephone Corporation matters, plural, because there were more than one, * * *."

[3] See Br. Op. 6-7: "A later audit revealed that only $82.41 went into plant and equipment and $8,957 to working capital (Govt. Ex. 26, Tr. 974, 979-980)." In this connection, "26" is a misprint for "76"; Govt. Ex. 26 was a letter from Cahn to Jones (165a-166a), Govt. Ex. 76 was one of the schedules prepared by Casagrande which was specifically objected to by petitioner (252a-256a) because it was improperly based on Govt. Ex. 71, the books and records now in question.

evidentiary value—or even quality of admissibility—except on the footing that what was found therein reflected truth.

Finally, but clearly not least, the Government relies on *United States* v. *Feinberg*, 140 F. 2d 592 (C. A. 2), certiorari denied, 322 U.S. 726, saying (Br. Op. 17-18), "*Feinberg*, we believe, is clearly correct, and in any event review of the question is no more justified in this case than it was in *Feinberg* itself." We have already discussed *Feinberg* at length (Pet. 25-27). Here it is only necessary to add this:

Examination of the petition for certiorari in that case (No. 757, Oct. T. 1943) discloses that it did not mention any conflict with other circuits such as the present petitioner invokes here; that it did not point out the palpable misreading of prior decisions which the *Feinberg* opinion involves; that it hardly mentioned the basic question of a disregard of the regular entry statute, now 28 U.S.C. § 1732(a); and that it did not, of course, dwell on, because it could not, the frank admission and finding of the court below in this case that the terms of that statute had not been met.

Thus the issues now squarely presented were not before this Court in *Feinberg*—and of course it should hardly be necessary to add that, even if they had been, denial of review there would not have imported any judgment on their merits.

Third. On both questions presented by the petition, therefore, each ruling below is not only contrary to public policy, but is one that is bound to unsettle vitally important areas of federal law.

Consequently, it is respectfully submitted that, for the additional reasons set forth above, the present petition for certiorari should be granted.

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